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No. 1381

In the
Supreme Court of the United States
OCTOBER TERM, 1969

CLARENCE W. HENDRICKSON,
Petitioner,

vs.

STATE OF INDIANA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE INDIANA SUPREME COURT

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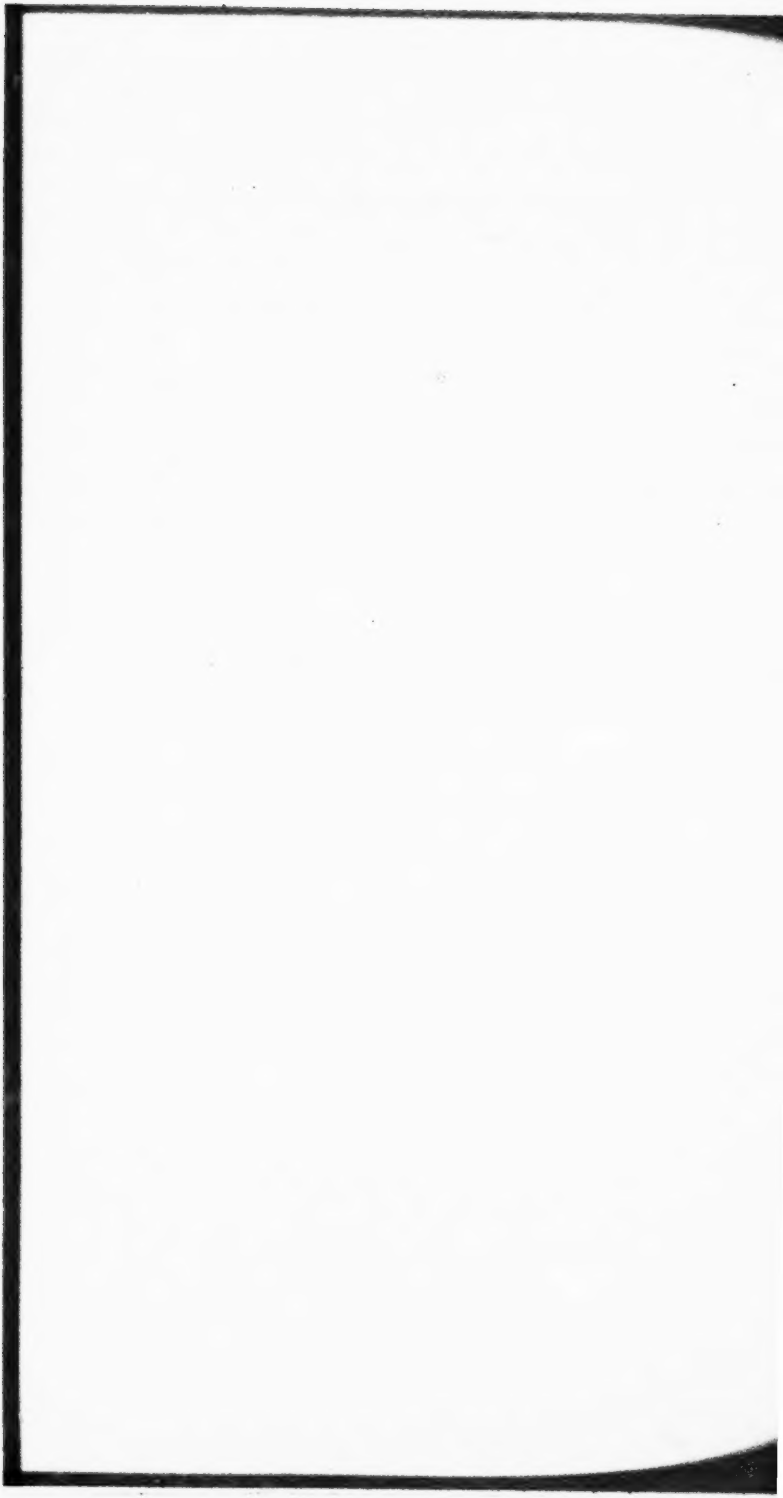

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To The Chief Justice Of The United States And The Associate Justices Of The United States Supreme Court:

The Petitioner, Clarence W. Hendrickson, prays that a Writ of Certiorari issue to review the judgment of the Indiana Supreme Court in the above case.

OPINION BELOW

The opinion below is reported at 254 N.E.2d 331 and is printed in the appendix to this petition.

JURISDICTION

The judgment of the court below was entered on February 6, 1969. A timely petition for rehearing was filed and rehearing was denied on March 5, 1970. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257(3).

QUESTIONS PRESENTED

1. Can the state impose the burden of proving a negative upon a criminal defendant in creating an exception constituting a defense in a criminal statute.

2. May the state convict and incarcerate a criminal defendant where at his trial the indictment charged him with the unlawful collection, under color of his public office, a specific corporate account while the evidence would show the money collected was for a different corporate account.

STATEMENT OF THE CASE

The petitioner was convicted on January 24, 1969, and the charge was that of Receiving Unlawful Remuneration; in receiving the sum of two hundred eighty seven dollars and twenty five cents ($287.25) from Interstate Ice, Inc. upon a collection made upon an account due Interstate Ice, Inc. Which said acts by defendant were not a part of his official duties as justice of the peace; the petitioner was sentenced on February 6, 1969 receiving one (1) year prison term and a one thousand dollar ($1,000.00) fine and costs.

Immediately prior to petitioner's trial, he filed a Motion To Quash The Indictment and a Motion To Strike Certain Averments, which were overruled. The Indictment read as follows:

"The Grand Jury for the County of Marion in the State of Indiana, upon their oath do present that Clarence Hendrickson on or about the 11th day of July, A.D. 1967, at and in the County of Marion and in the State of Indiana, then and there being the duly elected and qualified Justice of Peace in and for Perry Township, in

Marion County, Indiana, unlawfully agreed to collect a certain account due Interstate Ice, Inc., a corporation, from Michael Maio, in the amount of Five Hundred Seventy-four and 50/100 ($574.50), and under color of his office caused to be issued and served upon the said Michael Maio and one Alice Field summonses purporting to be issued in Cause Numbers 0506 and 0507 of the Perry Township Justice of Peace Court entitled *Indpls. Coal & Oil Co.* v. *Michael Maio And Alice Field* and directing the said Michael Maio and Alice Field to appear in said Justice of Peace Court; that thereafter said account in the sum of Five Hundred Seventy-four and 50/100 was paid by the said Michael Maio and the said Clarence Hendrickson, Justice of Peace on or about the 26th Day of July, 1967, unlawfully received the sum of Two Hundred Eighty-seven And 25/100 Dollars ($287.25) from said Interstate Ice, Inc., a corporation, for said collection of the said sum of Five Hundred Seventy-four And 50/100 Dollars ($574.50); that said acts by the defendant were not a part of defendant's official duties as said Justice of Peace nor authorized by law, then and there being contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Indiana."

That the Court said pertaining to the variance the following:

> "At most we can only say there was some conflict in the evidence, and this was resolved by the trier of the facts. Certainly the appellant was not misled by the allegations in the indictment nor is there any showing that he was harmed in any fashion, since the proof conformed to the charge."

REASONS FOR GRANTING WRIT

Two reasons are presented: (1) That the petitioner was denied due process because he was convicted where there was a vital variance between evidence at the trial and the indictment; (2) The state imposed a burden of proving a negative upon the defendant in creating an exception constituting a defense in statute under which he was convicted.

I.

WHETHER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT PERMITS A VITAL VARIANCE BETWEEN THE INDICTMENT AND THE EVIDENCE PRESENTED AT THE TRIAL. THE INDICTMENT CHARGED THE PETITIONER WITH RECEIVING REMUNERATION FOR COLLECTION OF AN ACCOUNT DUE INTERSTATE ICE, INC. WHILE THE TESTIMONY CLEARLY SHOWED THE ACCOUNT WAS DUE TO POLAR ICE, INC., THUS THERE IS A VITAL VARIANCE BETWEEN THE INDICTMENT AND EVIDENCE PRESENTED.

The indictment in this cause charges the petitioner, while acting under the color of his office as a justice of peace agreeing to collect a certain account due Interstate Ice, Inc. from Michael Maio under the cause numbers of the Perry Township Justice of Peace Court entitled Indianapolis Coal & Oil versus Michael Maio and Alice Field and that thereafter, Michael Maio paid Five Hundred Seventy-four Dollars ($574.00) to Interstate Ice, Inc. and that Interstate Ice, Inc. paid to the petitioner Two Hundred Eighty-Seven and 25/100 ($287.25) Dollars for collection of said account.

The evidence at the trial showed that there were 3 corporations involved, Polar Ice and Fuel Company, now Polar Ice, Inc., the Indianapolis Coal & Oil and Interstate Ice, Inc. No where in the opinion in the lower court is Polar Ice, Inc. mentioned although the state witness, Maio,

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testified that he owed the account to Polar Ice, Inc. and not Interstate Ice, Inc.[1] The evidence at the trial shows that the state's witness Schultz and Sexton's testimony as to the ownership of the account, was purely hearsay and that the shop book entries would have been the only proper method of proof of the ownership of the account.[2] Also,

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[1] Q. I will ask you of several years ago you incurred an account with Interstate Ice, Inc. in the sum of Five Hundred Seventy-four And 50/100 Dollars ($574.50)? A. I believe at the time it was Polar Ice, sir.

[2] Q. Isn't it a fact that the Polar Ice and Fuel is the real owner of that place where Michael Maio and Alice Fields got their ice? A. The real owner of what?
Q. Of the place that delivered the ice. Wasn't it the Polar Ice and Fuel plant? A. I don't know what—plant it comes from, it comes from all plants. A. Where did the ice come from.
Q. Yes, what company did the ice come from that the creditors, Maio and Fields purchased from what company? A. You mean what company produced the ice?
Q. Yes. A. I don't know sir.
Q. Now, isn't it a fact that there is some kind of an interlocking agreement or corporate agreement between the Polar Ice and Interstate Ice, isn't there? A. The Polar Ice and Interstate Ice?
Q. Yes, isn't there? A. In Indianapolis, yes.
Q. They are all affiliated together aren't they?
A. Well, I don't know.
Q. Isn't that the reason the account of Alice Field and Michael Maio was at the Polar Ice because Polar Ice and Fuel was the real party in interest? (Objection by Mr. Bath that real party in interest carries a legal meaning and objection sustained because it calls for a conclusion.)
Q. Are you an officer in the Polar Ice and Fuel Company? A. No, sir.
Q. Well, what is the working agreement then or the relationship between Interstate Ice, Polar Ice and the other corporation that you mentioned, Indianapolis Coal and Oil? A. Interstate is a company that delivered ice to wholesale places, railroads, and state fairs, and they bought the ice from Polar or Indianapolis Ice.

that the mere fact that the account was received by Interstate Ice, Inc. and the check given by Interstate Ice, Inc. to the petitioner is not conclusive of the offense charged.

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[1] (Continued)

Q. Who bought the ice, Interstate? A. Interstate did; that Corporation bought it from either one of the others.

Q. Now do you have the invoice on that purchase of Maio and Fields? A. Made out to them?

Q. Yes? A. *I don't know whether they do nor not.*

Q. Well, how do you know then that this particular transaction was made between Interstate Ice and Maio and Fields, how do you know that? A. How do I know?

Q. Yes. A. That Maio got the ice from Interstate?

Q. Yes, how do you know? A. *Well, I had the tickets probably.*

Q. Probably. Where is the ticket? A. Well, they were charged up at the bookkeeper office.

Q. Well, have you got the records with you? A. No, I don't.

Q. Then you know of your own knowledge now that the transaction concurred between Alice Fields and Michael Maio with Interstate Ice, you know that of your own knowledge, is that right? A. That's right.

Q. You know then? A. That they bought the ice from Interstate?

Q. Yes. A. Yes.

Q. Now, Mrs. Schmalz, in the early part of 1967, did a delinquent account by the name of Michael Maio come to your attention? A. Yes sir.

Q. Do, you recall the amount of that account?

A. Something around five hundred and seventy some dollars, seventy four dollars, something like that.

• • •

Q. Now, who was that account owed to Mrs. Schmalz?

A. Interstate Ice.

Q. And what efforts were made to collect that amount?

A. Well, they had tried to contact Mr. Maio several times and talked to his bookkeeper.

Q. Did these collection efforts produce any collection?

A. No sir.

Q. Now following that, what, if anything, did you do with the account towards collection? A. It was turned over to Robert Sexson.

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The indictment clearly charges the petitioner with receiving renumerations which is alleged to be unlawful for work done in the collection of an account *due* Interstate Ice, Inc. and therefore, it was necessary for the State to prove that the account belonged to Interstate Ice, Inc. That the State did not except by hearsay evidence of the officers of Interstate Ice, Inc. when the account supposedly collected belonged to the Indianapolis Coal & Oil Inc. or Polar Ice, Inc. according to the document and the testimony of Michael Maio. Thus, the material allegations of the indictment was not proven beyond a reasonable doubt, when such variance in the evidence is apparent. *Rhoades* v. *State,* 224 Ind 569, 70 NE2d 27 (1946); *Baker* v. *State,* 236 Ind 55, 138 NE2d 641 (1956); *Riggs* v. *State,* 237 Ind 629, 147 NE2d (1957).

II.

WHETHER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT PERMITS A STATE TO IMPOSE THE BURDEN OF PROVING A NEGATIVE UPON A CRIMINAL DEFENDANT IN CREATING AN EXCEPTION CONSTITUTING A DEFENSE IN A CRIMINAL STATUTE.

The defendant in this cause was charged in such a manner as to describe his conduct as legal and then to characterize it as illegal with the use of the adjective "unlawfully" and no other explanation. This imposed upon the petitioner the burden of proving that the conduct described was illegal in no particular when the trial court approved the language of the indictment by its denial of the petitioner's motion to quash.

What the indictment charges is the institution of a cause against Michael Maio and Alice Field by the Indianapolis Coal and Oil Co. directing them to appear, and the form of summons required by sec. 5-1601 Burns requires the

Justice of Peace to cause the issuance of the same, and no such causing the issuance can be described as outside of the official duties, and not authorized by law.

Thus, what the indictment describes an act within the official duties of a Justice of Peace, and then says such act is outside of the official duties and not authorized by law. An indictment cannot describe a legal act and call it an illegal act, for it has to be one thing or the other.

This is equal to pleading of a negative pregnant, that is to allege a legal act, and then denominate it an illegal act. *Fields* v. *State*, (1892) 134 Ind. 46.

CONCLUSION

For the reasons given it is respectfully submitted that the decision of the Indiana Supreme Court should be reversed upon a granting of certiorari herein and the said relief is hereby prayed for.

DEAN E. RICHARDS
Attorney for Petitioner

APPENDIX

Clarence W. Hendrickson, Appellant,

v.

State of Indiana, Appellee.

No. 569 S 123.

Supreme Court of Indiana.

Jan. 22, 1970.

Arterburn, Judge.

This is a criminal prosecution instituted by an indictment in two counts. Count I of the indictment reads as follows:

"The Grand Jury for the County of Marion in the State of Indiana, upon their oath do present that Clarence Hendrickson on or about the 11th day of July, A.D.1967, at and in the County of Marion and in the state of Indiana, then and there being the duly elected and qualified Justice of Peace in and for Perry Township in Marion County, Indiana, unlawfully agreed to collect a certain account due Interstate Ice, Inc., a corporation, from Michael Maio, in the amount of Five Hundred Seventy-four and 50/100 Dollars ($574.50) and under color of his office caused to be issued and served upon the said Michael Maio and one Alice Field summonses purporting to be issued in Cause Numbers 0506 and 0507 of the Perry Township Justice of Peace Court entitled Indpls. Coal & Oil Co. vs. Michael Maio and Alice Field and directing the said Michael Maio and Alice Field to appear in said Justice of Peace Court; that thereafter said account in the sum of Five Hundred Seventy-four and 50/100 Dollars ($574.50) was paid by the said Michael Maio and the said Clarence Hendrickson, Justice of Peace on or about the 26th Day of July, 1967, unlawfully received the sum

of Two Hundred Eighty-seven And 25/100 Dollars ($287.25) from said Interstate Ice, Inc., a corporation, for said collection of the said sum of Five Hundred Seventy-four And 50/100 Dollars ($574.50); that said acts by the defendant were not a part of defendant's official duties as said Justice of the Peace nor authorized by law, then and there being contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Indiana." (emphasis added)

Count II of the indictment reads as follows:

"The Grand Jurors aforesaid, upon their oaths aforesaid, do further present that Clarence W. Hendrickson, on or about the 11th day of July, A.D., 1967, at and in the County of Marion and the State of Indiana, then and there being the judge of a court of the State of Indiana, to-wit: the elected and qualified Justice of Peace in and for Perry Township, in Marion County, Indiana, did unlawfully engage in the business of collecting claims in that he agreed to collect a certain account due Interstate Ice, Inc., a corporation, from Michael Maio in the amount of Five Hundred Seventy-four and 50/100 Dollars ($574.50) and under color of his office caused to be issued and served upon the said Michael Maio and on Alice Field summonses purporting to be issued in Cause Numbers 0506 and 0507 of the Perry Township Justice of the Peace Court entitled Indpls. Coal & Oil Co. vs. Michael Maio And Alice Field, and directing the said Michael Maio And Alice Field to appear in said Justice of Peace Court; that thereafter said account in the sum of Five Hundred Seventy-four and 50/100 ($574.50) was paid by the said Michael Maio, and the said Clarence Hendrickson, Justice of the Peace, on or about the 26th day of July, 1969, unlawfully received the sum of Two Hundred Eighty-seven and 25/100 Dollars ($287.25) for collecting said account, then and there being contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Indiana". (emphasis added)

Appellant was found guilty upon both counts by the trial court.

As can be noted from the above quoted indictment, appellant, in his capacity as justice of peace, was charged with issuing summonses purporting to be issued in causes docketed in the Perry Township Justice of the Peace Court against debtors of Interstate Ice, Inc. In response to said summonses the overdue debt was paid and appellant is changed with receiving one-half of the amount so paid.

Appellant's first contention refers to count one of the indictment. Count one is based upon Burns' Ind. Stat. Anno. § 10-3729 which reads in pertinent part as follows:

"It shall be unlawful for any justice of the peace to receive directly or indirectly any remuneration or thing of value from any litigant or any one on behalf of such litigant in any pending cause in his court except for costs and fees provided by law, or to receive any remuneration or any thing of value from any one for doing any act under color of his office which act is not a part of his official duties nor authorized by law * * *"

[1] Appellant argues that his conduct in issuing the summonses was not an act done "under color of his office which act is not a part of the official duties nor authorized by law". Of course, the issuance of a summons by a justice of the peace is authorized by law where a complaint is filed or action et seq. In this case the evidence clearly shows that the summonses were issued with no complaint being filed and no cause actually docketed. The summonses issued by the appellant were in furtherance of an unlawful objective and not authorized. The constable testified that in this instance a zero was placed before the number on the summonses issued, while all others issued did not contain such a zero in the usual course of procedure in the justice of the peace court. He further stated that upon checking the docket he found no such cause represented by the numbered summonses. The issuance of the summonses was therefore unlawful, without authority, "under color of his office" and was not part of his official duties. We cannot say his conduct was authorized

by law under the particular circumstances. "Color" legally means an appearance, semblance or an apparent right. Black's Law Dictionary, 4th Ed. defines color of office as follows: "Act unjustly done by the countenance of an office, being grounded upon corruption, to which the office is as a shadow." In our opinion, where an official process is issued unlawfully without the basis or background which makes it legal, it is done under color of the office issuing such a process, and in this case the summonses here clearly were issued under color of the office of the appellant as justice of the peace.

[2] Appellant further claims a variance because the evidence shows the summonses were issued in the name of the Indianapolis Coal and Oil Company as the creditor, whereas the appellant collected an account in the amount of $574.50 due Interstate Ice, Inc., in our opinion there is no variance here, since that is exactly what the indictment alleges, and the evidence conforms to the indictment. It shows that Robert Sexson was President of Interstate Ice, Inc. and Indianapolis Coal and Oil Company; that it was an interlocking corporation, with a large portion of the stock held by the same persons. The evidence contributed by officers of Interstate Ice, Inc. clearly shows that the account was in the name of Michael Maio and in the same sum as alleged, and that Maio testified that he paid the account to Interstate Ice, Inc. after he got the summons entitled "Indianapolis Coal and Oil Company". He knew it was for the same account.

At most we can only say there was some conflict in the evidence, and this was resolved by the trier of the facts. Certainly the appellant was not misled by the allegations in the indictment nor is there any showing that he was harmed in any fashion, since the proof conformed to the charge Smith v. State (1960), 241 Ind. 1, 168 N.E.2d 199; Madison v. State (1955), 234 Ind. 517, 130 N.E.2d 35.

It is apparent from the evidence, as the indictment charges, that the summons in the name of Indianapolis Coal and Oil Company was used to collect the account in the name of Interstate Ice, Inc. The evidence shows that

prior to the issuance of the summons by the appellant, the appellant met with Robert Sexson, President of the Indianapolis Coal and Oil Company, who was also president of Interstate Ice, Inc., in Sexson's office at Indianapolis Coal and Oil Company to discuss the collection of the account referred to in the indictment. The appellant knew that Mr. Sexson was doing business under both names. Maio testified that when the summons was given him he called the Interstate Ice, Inc. Appellant's brief, in summarizing Maio's testimony, states in regard thereto that: "I [Maio] called Interstate Ice and told them, and paid the bill to Interstate Ice and did not appear in court, [and was told when I paid the bill I didn't have to appear]." The evidence is uncontradicted that thereafter appellant received half of the account, namely $287.25 by a check drawn on Interstate Ice, Inc. for services in making the collection. The evidence on count one is sufficient to sustain the judgment.

[3] In regard to count two, that the appellant "did unlawfully engage in the business of collecting claims", there is no evidence in our opinion to sustain the charge of a practice or a business, since the court had before it only one instance of debt collection—that referred to in count one. Snyder v. Heinrichs (1944), 115 Ind.App. 129, 55 N.E.2d 332 and cases therein cited; 93 A.L.R.2d 90; 5A Words and Phrases, "Business" p. 640, et seq. It is well settled in this state that the making of one loan is not a practice of engaging in the lending business that requires a license, nor is making one trip with passengers for pay engaging in the business of a public carrier. The cases are innumerable on this issue. In our opinion, the evidence is insufficient to sustain the conviction of count two.

The judgment of the trial court is affirmed as to Count One and reversed as to Count Two.

HUNTER, *CJ.*, and GIVAN, *J.*, concur.

DEBRULER and JACKSON, *JJ.*, concur in result.